GALLAHER

Constitutional Status of the Dependencies of the U. S.

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THE CONSTITUTIONAL STATUS OF THE DEPENDENCIES OF THE UNITED STATES, AND ITS BEARING ON CIVIL RIGHTS THEREIN.

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THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

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INTRODUCTORY.

Hardly any constitutional question has been more continually before the American people since the establishment of our national government, than what shall be the status of newly acquired territory and the civil rights of the inhabitants. Ours has been an expanding nation. Even during the period of its formation, negotiations were on foot which finally led to the cession, by the states to the Federal Government, of their claims to the Northwest Territory. This cession is not important because of any increase of territory; there had been simply a transfer of title from one part of the governmental system to another part. The claims of the colonies to all land east of the Mississippi river had been clearly established before this. The thing which most concerns us here was the system of government created for the territory by the Ordinance of 1787. Enacted, as it was, during the dying moments of the old Confederation, it stood, nevertheless, for a hundred years and more, as the basis for territorial legislation. Louisiana, Florida, Mississippi, Alabama, the Mexican conquests, and to a certain extent, Alaska, were governed, at first, by provisions identical to those laid down by it, and in accordance with the principle therein established. It was not until the last decade of the nineteenth century, that a situation arose so different from any former one, that the old policy of dealing with territorial acquisitions was found to be insufficient, and that a new method was adopted.

There were two essential elements of difference in the new situation. The first was, that until the year 1898, with the exception of Alaska, the extensions of our national domain had been

over contiguous territory. The second point was, that the civilization of the inhabitants thus acquired was such that they might reasonably be expected to qualify themselves for citizenship and self-government in a comparatively short time. The state of civilization which they had reached, their habits and customs, their religious beliefs, in fact, all those things which give to a race its distinguish ing characteristics were not essentially different from our own. The one exception to this general statement was, as has been said, Alaska. There, the presence of the native tribes necessarily complicated in some degree the question of governmental policy. Yet these native tribes were few in number, and required practically the same treatment as did the Indians of the western states.

Even when the Hawaiian Islands were annexed in 1898, the presence therein of a large number of civilized white persons; the high plane of civilization which the natives in general had reached, and the existence, already, of a republican form of government in the islands made the question one, not of constitutional status, but of international and political policy.

The treaty of 1898 with Spain, however, left us in a much more serious dilemma. As to Cuba, # we had at the outbreak of war with Spain, disclaimed all intention of exercising sovereignty, jurisdiction or control over the island except for the pacification thereof, and had asserted our determination to leave its government and control in the hands of its people. The title to Porto Rico, and the Philippine Islands, had been vested by the treaty in the United States; it had given us complete sovereignty over them; and thrust upon us the duty of establishing some form of civil government, and maintaining peace and order therein. Here is where the difficulty

30 Stat.at L. pp, 738-739

lay. The Philippine Islands are separated from us by thousands of miles of ocean; we were then not quite sure whether we ought to retain possession of them; give them their independence, perhaps under a protectorate; or turn them over to some other nation which was more experienced in governing colonies than ourselves. Porto Rico lay near to our shores, and the expediency of retaining possession of it, was not seriously questioned. There were, however, in both territories, a considerable body of natives of varying degree of civilization. Those of Porto Rico gave evidence, under American guidance, of becoming capable of such local self-government as is given to organized domestic territories of the United States, though their conception of the principles underlying free institutions of government was narrow, to say the least. Those of the Philippine Archipelago ranged from the partially civilized native, as found in and around the city of Manila, to the semi-savage Mohammedan Moros and the Cannibal tribes of the southern islands. Whether these would ever be fitted for local self-government was and is yet a much debated question.

The experiences of foreign nations in similar situations have not been assuring. Especially is this true of the English experience in India; and the conclusion which has been reached there is that while the government must be carried on in the interest of the native population, and in accordance with their habits and customs, it must nevertheless always be carried on by Englishmen. American institutions are the result of centuries of growth, and of Anglo-Saxon genius for government. It would be idle to suppose for a single moment that these institutions could be suddenly and successfully transplanted to the islands of Porto Rico and the Philippines. Some mod-

ification of the American system therefore seemed necessary.

But the makers of the Constitution apparently had not taken into consideration the possibility that the government which they were establishing for Americans would sometime be called upon to rule over a country and a people so far removed from us, in physical distance, race, and civilization. There is no specific provision in that instrument for such an emergency; if authority were given at all, it must be found in the general clauses, and in the nature of the governmental system. The legislative and executive branches of the government have found what they consider to be sufficient constitutional authority for the necessary modification, and their conclusions have been supported by a majority of the Supreme Court, but, as Professor Burgess has pointed out;# the four strongest members of that body, not only voted in the minority in a case in which the question was involved, but supported their conclusions by powerful dissenting opinions. The gravity of the situation is at once evident, and conclusions can properly be drawn only after a careful consideration of both sides of the question. The purpose of this paper will be to state as clearly and fairly as possible, the arguments for and against the principle on which the government is now proceeding, together with the bearing of that principle upon the status of the dependencies; the civil rights of their inhabitants; and the conclusions which seem to be warranted from the facts.

Political Science Quarterly, 1901. vol. 16, p 486.

As has been said, at the close of the war with Spain, the title to the Philippines and Porto Rico, together with absolute sovereignty and control over these islands, was, by the treaty of peace, vested in the United States. The power of the United States thus to acquire territory had been definitely settled both by long established precedent, and by judicial decision. We are a sovereign nation; the Constitution confers upon the national government the power to carry on war, and to make treaties. Acquisition of territory is often a logical if not an essential feature in the exercise of these powers, and has therefore been held by the courts to be constitutional.

The signing of the treaty brought peace between the belligerent forces of Spain and the United States. If left, however, the government of the newly acquired territories in the hands of the military authorities. This also was justified by precedent and authoritative judicial decision; the acknowledgement of our sovereignty by Spain did not necessarily mean that the inhabitants of the ceded territory would quietly acquiesce in the cession. A state of war had existed; the control of the United States authorities must be made effective; and above all, Congress must be given sufficient time in which to devise a scheme of government, before the military administration could be displaced by the civil. The acquisition of Louisiana, Florida, and the Mexican territories had, in each case, been followed by a period of military government.

The real difficulty lay in the form of civil government which should be given in this case. Treaties of cession heretofore had contained certain stipulations in regard to the future disposal of the inhabitants concerned. That with France in 1803, for the pur-

chase of Louisiana said:#"The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."

Practically the same provision is found in the treaty with Spain (1819) ceding Florida; the treaty of peace with Mexico (1848) ceding California and New Mexico; and the treaty with Russia (1867) whereby Alaska was acquired. That of 1898 with Spain, Article 9, declared that: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Spanish inhabitants were to be allowed a certain time in which to elect citizenship, being perfectly free to retain the old or accept the new. The United States was thus left with a free hand, so far as treaty obligations were concerned, and might do as it willed with the new possessions. Yet not entirely as it willed, for there was on one side, the Constitution, and on the other, the people of the dependencies to be considered. Given a liberal allowance of time for Congress to erect civil governments, it was still plain that these people would not then be fitted for such a measure of free and local self-government as had heretofore been given in the other cases. On the other hand, the Constitution contained certain clauses, relative to due process of law in judicial proceedure, the collection of customs duties and internal revenue taxes, and the maintainance of republican forms of government, all or some of which seemed impossible of application. The position of the

Art.3,Treaty 8 U.S.Stat,200-202

islands was more nearly that of the colonial posessions of European nations.

The first definite action taken by Congress, was the passing of the so-called Foraker Act # of April 12th,1900. This act was virtually a constitution for the island of Porto Rico. It provided for a Governor, to be appointed by the President, by and with the consent of the Senate; an Executive Council, appointed in the same way, for the term of four years unless sooner removed by the President, and composed of a Secretary, Attorney General, Treasurer, Auditor, a Commissioner of the Interior, a Commissioner of Education, and five native Porto Rican members. A House of Delegates, composed of 35 members, chosen from seven districts of the island, for a term of two years, was also provided. These two bodies, the Executive Council and the House of Delegates, were together to form the Legislative Assembly of Porto Rico.

The sessions of the Assembly were limited to sixty days in length; the first session was to be called by the Executive Council, which was also to provide the manner of election of members for the lower house. Extra sessions might be called by the Governor. Members of the House of Delegates must be 25 years of age; able to read and write either the Spanish or the English language, and posessed of a certain amount of taxable property.

The Governor was given a veto power which, however, could be over-ruled by a majority of two-thirds in each house. The power of local legislation was given to the Assembly, with the exception that franchises were to be granted by the Executive Council, and all laws were to be subject to the final consideration and repeal by the Congress.

31 Stat.at L.,p 77.

Suffrage was limited only to citizens of Porto Rico of one years bona fide residence therein. People thus qualified were to be known as citizens of Porto Rico,(not of the United States). A resident commissioner to the United States was to be appointed, his salary being paid by the latter government; and aCommission of three mem bers, of which one must be a native Porto Rican was to report on a permanent system of government.

It was also enacted that the tariff on goods entering the island from a foreign country was to be the same as that on the same goods entering the United States, except that the rate on coffee was to be five (.05¢) per pound and that Spanish books were to be admitted free. As between the United States and Porto Rico, the tariff rates were to be but 15 per cent of those on foreign goods, and even that rate was to cease after March 1st, 1902 or as soon as a system of local taxation could be put in force. These duties were in no case to be pai d into the general fund of the United States, but were to be kept separate and used by the President for the benefit of Porto Rico. So soon as a civil government was established, these duties were to be paid into the local treasury. This rule was to apply to those duties collected upon Porto Rican goods coming into the United States, as well as upon United States products coming into Porto Rico.

Porto Rican vessels were to be naturalized, "and the coasting trade between Porto Rico and the United States was to be regulated in accordance with the provisions of law applicable to any two great coasting districts of the United States."

Section 16 of the Act, also, runs as follows:- "All judicial process shall run in the name of the 'United States of America, ss; the President of the United States', and all criminal or penal pros-

ecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico'; and all officials authorized by this act shall, before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico."

A regular system of courts was established and provision made for appeals to be taken from the supreme court of the Island to that of the United States. Porto Rico was erected into a judicial district of the United States, and the supreme Court of the Island was given the power and functions of a United States circuit court.

This detailed analysis of the Foraker Act is given in order that later references to it may be clearly understood. It is at once apparent, from what has been said, that if Porto Rico were considered as a part of the United States in the ordinary sense of the term, that clause in the Constitution which provides that "all duties, imposts, and excises shall be uniform throughout the United States" (Art.1, Sec.8) has been grossly violated. The theory however, upon which Congress acted in the matter seems to have been that there may be territory within the boundaries of the United States, and under its sovereign power and control, which, nevertheless, has not been incorporated into the Union, and which is therefore not a part of the United States within the meaning of the uniformity and certain other clauses of the Constitution.

Practically the same principle was adopted in the act to provide a civil administration for the Philippine Islands, passed July 1st, 1902. The tariff rate was fixed at 75 per cent of the regular foreign tariff as provided in the Dingley Act, the calling of an elected legislative assembly was delayed until peace was estab-

lished in the major part of the Islands; and a somewhat larger discretion was given to the Philippine Commission than had been given to the Executive Council of Porto Rico. Such changes as were made were thus merely those of detail to suit the different conditions prevailing in the eastern posessions.

The position of the legislative department of the government being determined, let us turn to that of the judiciary, for with the Supreme Court rests the final determination of the constitutionality of Congressional acts:-

In the first case involving this question - that of De Lima vs Bidwell, 182 U.S. - the question before the court was: "Can the United States government continue to collect the ordinary duties on merchandise from foreign countries upon the like merchandise coming from Porto Rico into the ports of the United States after the establishment of the sovereignty of the United States in and over Porto Rico, and the assumption by the United States of government and jurisdiction therein and thereover."

The answer of the court was clear and unqualified: "The law of the land ... is, as I have said, that, when the sovereignty of the United States and the jurisdiction of the United States government became established over any territory, district, or country by a completed treaty of cession, accompanied by posession, that territory, district or country ceases in all respects to be foreign to the United States, and becomes domestic for all purposes, and all the laws of the United States in respect to the relations to foreign countries cease immediately to have any application to such territory, district or country, or any force in regulating its relations or the relations of its inhabitants to the other parts or the inhabitants of the other

parts of the United States."

In the case of Dooley vs United States,# the question involved was whether these duties might be levied upon merchandise coming into Porto Rico from the United States. Until the ratification of the treaty of peace, such duties had been collected by the American military authorities in the Island. This action, however, was based on the theory that the Spanish soveriegnty remained, though dormant, in the Island, until Spain herself relinquished that sovereignty. Such had been the interpretation placed upon the matter by the Supreme Court in the cases of Fleming vs Page,(9 How.603), and Cross vs Harrison (16 How.164). The first of these cases involved the right of the United States to levy duties upon merchandise coming from the Mexican city of Tampico, while that city was in the posession of the American forces during the Mexican War. Had the right to levy these duties been denied, it would have followed necessarily that Tampico was a part of the United States; and that it had been made so by the President thereof acting in his capacity of commander-in-chief of the naval and land forces of the United States, and without any action whatsoever upon the matter by Congress. Such power to enlarge the boundaries of the United States has never been given to the President and he cannot exercise it. So in the case of Cross vs Harrison it was held that the duties imposed by the American military governor of California at SanFrancisco, during the continuation of the war with Mexico, might be such as the military authorities saw fit to make them. But, the later action of that governor in putting in force the regular United States schedule of duties immediately upon receipt of the knowledge that California had been ceded to the United States, even though it was done without the express direction of Congress,

Sec.182, U.S.Reports.

was held to be valid.

On the ground of these two decisions, therefore, the imposition of duties on goods coming from the United States into Porto Rico, during the continuation of the war with Spain was held to be valid. But immediately upon the cession of Porto Rico by Spain to the United States, the military order imposing these duties, according to the opinion of the Supreme Court in Dooley vs The United States above cited, "ceased to apply to goods imported from the United States.... and that until Congress otherwise constitutionally directed, such merchandise was entitled to free entry."

A little later, in the case of Huss vs The New York & Porto Rico Steamship Company, it was decided that Porto Rico had been brought, by the treaty of 1898 with Spain, within the coasting laws of the United States.

Thus far, the action of the Supreme Court seemed to indicate that that body was holding to the idea that wherever the power of the United States Congress goes, there also is the Constitution, extended thither ex proprio vigore. The court itself, however, was divided on the matter, four of the justices being found in the minority. Just at this juncture, there came the great case of Downes vs Bidwell already referred to, and involving the question of the power of Congress to impose duties between the United States and Porto Rico. Until this time, it seems that the constitutionality of the Foraker Act had not been called into question, the discussion merely involving the condition of affairs precedent to any action on the part of Congress. Now, however, we find what seems to be a reversal of the decisions cited above in the De Lima and Dooley cases, and a frank statement that the duties there declared unlawful, may be levied by the Congress,

should it see fit to do so. The apparent change of front was caused by the action of one Justice only. Heretofore, the Chief Justice, Justices Harlan, Brewer, Peckham and Brown had constituted the majority of the Court. Now, we find Justice Brown acting with the other four members, Justices Shiras, White, McKenna and Gray, thus constituting a new majority. We do not wish to doubt Justice Brown's consistency; that question is aside from the one under discussion, and we waive it here.

Let us proceed at once to an examination of the opinions, both concurring and dissenting, handed down in the case. Justice Brown gave the opinion of the Court. The kernel of his argument is found in the statement that: # "We are, therefore, of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imposts from such Island....."

This position is supported by the following six definite propositions:-

1. The District of Columbia and the Territories are not within the judicial clause of the constitution which gives to the United States Courts jurisdiction in cases arising between citizens of different states.

2. The Territories are not states within the meaning of Revised Statutes, 709, permitting writs of error from this court in cases involving the validity of a state statute.

3. The District of Columbia and the Territories are states in regard to their relations with foreign countries.

See 182 U.S.244

4. The Territories are not within the clause of the Constitution providing for a Supreme Court, and such inferior courts as Congress may see fit to establish.

5. The Consular Tribunals of the United States are not under the Constitution.

6. If the Constitution has been extended to any Territory by the Congress, then it is in full force and effect in that Territory.

These propositions, Justice Brown considers to have been established by various acts and judicial decisions made and given since the foundation of our national government. The decision of Chief Justice Taney in Scott vs Sanford,(19 How.446) to the effect that "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States, or at a distance, to be ruled and governed at its own pleasure", he considers as greatly impaired by the result of the Civil War which settled affirmatively the power of Congress to deal with the territories as seems best to it.

Furthermore, he declares that there is no middle ground between the old doctrine of ex proprio vigore, and what might be called the "American Empire" as enunciated by John Marshall. In this American Empire there are certain principles of natural justice inherent in the Anglo-Saxon character which would work against wanton oppression, and for equitable government.

"To sustain the judgement in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the

power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed', and that 'no title of nobility shall be granted by the United States', it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the first amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances'. We do not wish however, to be misunderstood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

Returning to the question in this particular case, Justice Brown brings up the argument that a tax on imposts is necessary. The island of Porto Rico is already burdened with a debt of $30,000,000; and a system of local taxation can not be put in force for at least two years. The people are not used to direct taxation; the imposition thereof in amount sufficient to provide for the expenses of the government would involve a tyranny worse than that of the Spanish rule, and perhaps cause great disturbances.

And as a concluding statement, he says that the United States as a sovereign nation should be posessed with power in dealing with acquired territories equal to, or in the same as that posessed by other nations.

His central idea therefore, is, as has been intimated, that the United States may have sovereignty and control over certain lands and peoples, to which however, the Constitution has not been extended

by Congress, and in the government of which Congress is not controlled by that instrument.

It is worthy of notice here that, while the remaining Justices of the majority concurred in the result at which Justice Brown arrived, namely, that Congress could levy the duties between Porto Rico and the United States, they by no means concurred in the reasoning by which he arrived at that result. We cannot enter at length into their argument; their reasoning may be summed up in a few sentences. It is, that the government of the United States is born of the Constitution, and all power is derived from that instrument. In dealing with the territories, Congress is governed by all parts of the Constitution which are applicable, and derives its power from that clause which says that "Congress shall have power to dispose of and make all rules and regulations respecting the territory or other property of the United States." They cite Cuba as an example, and say: (182 U.S.343), "It is lawful for the United States to take possession of, and hold in the exercise of its sovereign power, a particular territory; without incorporating it into the United States."

We turn now to take up the argument of the dissenting Justices. In regard to it,Professor Burgess says,# in substance, that it is the path of reason and sound judgement, as compared with the winding and devious ways which have been threaded by the Court. The position of these Justices may be stated briefly as follows: All branches of the government are limited by the constitution; they cannot act beyond its jurisdiction. Wherever Congress has the power to legislate, or wherever the sovereignty and jurisdiction of the United States extends, there also is the Constitution, extented thither by its own force, and compelling conformity with its provisions.

Political Science Quarterly 16:486.

Such is the law as it is found, and to interpet it otherwise is to amend the Constitution by judicial construction when another way has been expressly provided.

We cannot here give all the arguments and judicial decisions which were cited in order to prove this conclusion. Two points only will be taken up, and these because they are the chief ones in the case. First, as to the violation, by the Foraker Act, of that clause in the Constitution which calls for uniformity in import duties throughout the United States, the Chief Justice who wrote the dissenting opinion, cites the case of Loughborough vs Blake 5 Wheat.317. Here the court says: "The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American Empire? Certainly, this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary on the principles of our great constitution, that uniformity of imposts, duties and excises should be observed in the one than in the other."

This dictum of Chief Justice Marshall would of itself be sufficient to over-rule the decision of the case under discussion, but Justice Brown sets it aside with the remark that it holds good so far as the District of Columbia is concerned, but further than that it has no bearing on the case in hand. We cannot see the force of his reasoning. The ruling of the great Chief Justice has stood the test of a century, and has been pointed out in many decisions, the

fact that an emergency exists is not sufficient cause for the setting aside of the organic law in any such arbitrary fashion. As Chief Justice Fuller points out, the levy of duties is a regulation of Commerce, geographical, not intrinsic in nature; and the use to which the duties are put, in the case of Porto Rico, does not make them local. The natural meaning of the words must be taken, rather than any possible interpretation.

The second point under consideration is that brought out in Justice Brown's opinion, that the constitution does not of itself extend to newly acquired territories, but must be extended there by Congress; and that we may thus have territory over which Congress rules, unhampered by the provisions of that instrument. Much stress is placed by the learned Justice upon the idea that the American government is a government of states, not territories and states. He reviews the entire history of the country from the time of the Confederation to the present day and thereupon draws the above conclusion Much importance is given to the idea that the phrase, "or subject to the jurisdiction thereof" so frequently used in the Constitution, indicates that there is, in the contemplation of that instrument, territory which does not form any integral part of the United States. This phrase is found particularly in the thirteenth amendment and the idea is put forward that without it, slavery might have continued in the territories. The answer of the Chief Justice is simple. He says that the amendment would have operated throughout the whole domain of the United States even without that phrase; and that it was inserted simply and wholly out of abundant caution.

In regard to the power of Congress to extend the constitution we wish simply to cite the following quotations from the dissent-

ing opinion in Marbury vs Madison 1 Crauch 137, 176; "The original and supreme will organizes the government and assigns to different departments their respective powers. It may stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

Dred Scott vs Sanford 19 How.393. Mr.Justice McLean:- "No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr.Justice Campbell:- "I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no discretion but the discretion of Congress."

Murphy vs Ramsey 114 U.S.15. "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national. Their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

If these cases are not a complete and authoritative denial of the position taken by the court in this case, then the popular and common understanding of our political institutions is wrong, and has been wrong for a hundred years. Justice Harlan, in his separate dissenting opinion says; "if the principles thus announced (referring to

Justice Brown's position) should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from an era of constitutional liberty, guarded and protected by a written constitution, into an era of legislative absolutism."

It is not to be denied that Congress has large powers over the territories belonging to the United States. The whole legislative authority in regard to them and their people is vested in Congress; but what has been said before proves conclusively that this power, this authority, is to be exercised always and everywhere under the direction of the sovereign will of the people as expressed in the Constitution. The day is past when any single person or legislative body shall unrestrainedly legislate for a people, and especially for a people totally misrepresented in that body.

The opinion of the court in the case of Downes vs Bidwell is the opinion of but one judge of that court, and the doctrine therein set forth should not form a basis for later decisions or for governmental acts. But while the doctrine may be rejected, the decision may not be, since, as has been pointed out, that was concurred in by a majority of the court. We thus have a somewhat anomalous result; the Philippines and Porto Rico stand in the position of annexed but incorporated territories, with the precise reason therefor undetermined. Just what constitutes incorporation is not yet known, though some examples of it will appear later.

With the status of newly acquired territory is indissolubly connected that of the inhabitants thereof. Until 1898, the doctrine enunciated by Marshall in speaking of the Spanish treaty of 1819, had been the guiding principle of the government in dealing with newly

acquired peoples. He said:# "This treaty is the law of the land , and admits the inhabitants of Florida to the enjoyment of the privileges rights and immunities of citizens of the United States..... They do not however, participate in the political power; they do not share in the government, till Florida shall become a state."

Up until that time also a man was supposed to be either a citizen of the United States, or an alien. There was no middle ground. An American citizen was defined by the fourteenth amendment to the Constitution, as one who was either born or naturalized within the United States, and who was also subject to the jurisdiction thereof. Now, according to the case just considered, the natives of Porto Rico and the Philippines were subject to the jurisdiction of the United States, but neither born nor naturalized therein. The mere fact of annexation, it was held, did not extend the boundaries of the home country; that could only take place when incorporation was effected.

The first case to come before the Supreme Court involving this question was one arising in the Hawaaian Islands. By joint resolution of both houses of Congress, these islands were, on July 7th, 1898, annexed to the United States. This joint resolution, among other things, contained a provision that all municipal legislation in force therein, and not inconsistent with the Constitution and laws of the United States, should remain in force until Congress should otherwise determine. On April 4th, 1900, an act was passed erecting Hawaii into an organized territory and giving to it a territorial government. Between these two dates, one Mankichi, a native of Hawaii, was tried and convicted of manslaughter and condemned to life imprisonment. The case was later brought before the Supreme

Am.Ins.Co. vs Canter. 1 Pet.540.

Court of the United States on a writ of error, charging that the trial had not been according to law, and urging that the defendant was therefore entitled to his liberty. The illegality charged was that Mankichi had been held to trial on an indictment by information, and that the verdict of the jury was rendered by the consent of nine instead of twelve jurors. Now, by the Constitution as interpretated by the Supreme Court, no person shall be held to answer for crime unless upon the indictment of a grand jury; and the trial of all crimes must be by the common law jury of twelve men, with a unanimous verdict. This position has not yet been opposed, nor was it in this case.

The position taken by the majority of the court was that, if the Constitution applied to Hawaii during the interval from July 7th,1898 to April 4th, 1900, the trial of Mankichi was illegaly conducted and therefore void. The contention of the court, however, was that the Constitution did not apply;# "that, in interpreting a statute, the intention of the law -making power will prevail even against the letter of the statute;" that, "In inserting in the Resolution of July 7th,1898 annexing Hawaii, a provision that municipal legislation not inconsistent with the Constitution of the United States should remain in force until otherwise determined, Congress did not intend to impose upon the islands every clause of the Constitution, and to nullify convictions and verdicts, which might, before the legislature could act, be rendered in accordance with existing legislation of the islands, but not in accordance with the provisions of the Constitution, nor was such the intention of Hawaii in surrendering its autonomy."

Justices White and McKenna, in a concurring opinion, held that the Constitutional provisions were not applicable to Hawaii be-

190 U.S.197.

cause that island had not at that time been incorporated into the United States and made an integral part thereof.

Here again, the difference in opinion was so great that we find a strong dissent expressed, this time by Justice Harlan alone.# His conclusions as summed up by himself are as follows:-

"I am of the opinion: First, that when the annexation of Hawaii was completed, the Constitution - without any power of Congress to prevent it - became the supreme law of that country, and therefore, it forbade the trial and conviction of the accused for murder otherwise than upon presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury.

Second: That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated or forbade the enforcement of any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret the law."

He points out very clearly that if the Constitution must be extended by Congress, then Congress is above the Constitution, a doctrine dangerous to and perversive of American free institutions.

The position which he takes is upheld in the case of the Chicago, Rock-Island & Pacific Railway Company v. McGlinn (114 U.S. 546) which says:-

"As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus upon a cession

190 U.S.248-249.

of political jurisdiction and legislative power - and the latter is involved in the former - to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments and the like, would at once cease to be of obligatory force without any declaration to that effect."

The court had held that indictment by grand jury, and the unanimous verdict of the petit jury were not essential features of the Constitution, but only incidents of judicial prodeedure. Yet the case of Thompson vs Utah (170 U.S. 343) declared that an act of Congress providing for a trial by a jury of eight persons, in the territory of Utah would have been in conflict with the Constitution. Ex parte Bain (121 U S.1) held that indictment by grand jury was essential to conviction. It is also worthy of note, as Justice Harlan suggests, that the question of whether these things are fundamental in their nature or not, does not relieve the court of its duty to defend and to maintain the Constitution as it stands.

According to the ruling in this case, Hawaii was merely an annexed territory of the United States, during the period above mentioned, and entirely subject to the will or whim of a Congress unrestrained by constitutional provisions. Moreover, there was no reason why that island could not have been kept in that limbo for a hundred years or more, in fact indefinitely.

We turn next to the Philippine Archipelago.# In his instructions to the Philippine Commission dated April 7th, 1900, President McKinley made the following statement:-

"Upon every division and branch of the Government of the Philippines therefore, must be imposed these inviolable rules:-

That no person shall be deprived of life, liberty or prop-

See"Compiled Reports" p 9.

erty without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines be imposed, nor cruel nor unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or to be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crimes; that no bill of attainder or ex-post-facto law shall be passed that no law shall be passed abridging the freedom of speech or of the press, or the rights of the people to peaceably assemble and petition the Government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

It will be readily seen that this is a repetition of the bill of rights as found in the Amendments to the Constitution. The only exceptions, or rather omissions are the right to trial by jury, presentment or indictment by grand jury, and the right to bear arms. These instructions were embodied almost word for word in the act of July 1st,1902 providing a civil government for the Islands. The Supreme Court has, in the case of Dorr vs The United States (195 U.S.

142), denied the right to trial by jury to an American citizen resident in Manila. It could not do otherwise, in the light of its rulings in the cases above cited; yet we are thus brought face to face with the fact that the inhabitant of the Philippines, and of Porto Rico, no matter of what nationality he may be, if accused of crime, cannot claim the right of trial by jury. And let him who considers this right unessential consult the works of Justice Story, the great constitutional lawyer, where in volume 2, section 1779, he will find it stated that our ancestors, from the earliest times, insisted on it "as a great bulwark of their civil and political liberties." The Supreme Court itself has said # that the right to trial by jury is a right "dear to the American people", and has "always been an object of deep interest and solicitude, andevery encroachment upon it has been watched with great jealousy."

Because some of the states have denied or abridged this right is no justification for the United States to do it through a legislative act. The rights of the citizens of the separate states are the special care of the states themselves. The national government cannot interfere in the internal affairs of the state except it be for a national interest. If the states choose to deny this right to trial by jury, that is no concern of the national government. But if the national government chooses to deny that right, let it do so in the way which the Constitution has provided, by an appeal to the sovereign people in the same way as the states must do. Otherwise, let the Constitution be enforced as it stands, regardless of consequences for no price can be put upon American liberties. The doctrine of inexpediency or necessity would certainly put these liberties in danger.

One other case only remains to be considered. That is a case

(Parsons vs Bedford) 3 Pet.446.

arising in Alaska. In a decision handed down on April 10th,1905 the Supreme Court holds that the right to trial by jury extends to Alaska and that trials by less than the common law jury are void. That territory has not yet been given the regular form of territorial government, hence it stands in a position midway between that of an organized territory like Hawaii and a territory like Porto Rico to which the Constitution "has been extended". The reason given by the court for this decision is that Alaska is an "incorporated" territory and that the Constitution therefore extends thereto. As evidences of incorporation, three facts are cited: First, the text of the treaty which in Article 3 declares that: "The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion". Second: that by the acts of July 20th,1868,(15 Stat.167), and July 27th,1868 (15 Stat.240), the laws of the United States relating to customs, commerce and navigation were extended over Alaska, and a customs district was established therein. Third: that the territory of Alaska was assigned to the ninth judicial circuit by the judiciary act of March 3rd,1891,(26Stat.826). The court seems to have forgotten that the second and third of these facts at least, are to be found in the case of Porto Rico also, and yet the latter is not an incorporated territory.

In summarizing the results of our investigation we find that there are three classes of dependencies of the United States. The first is the organized, incorporated territory, of which Hawaii is now an example; the second is the unorganized incorporated territory such as Alaska; the third is the organized unincorporated territory

such as Porto Rico, The Philippine Archipelago, and the Panama Canal Zone. The incorporated territory is ruled by Congress under the provisions of the Constitution; the unincorporated territory is ruled by Congress also, but the latter body is in this case, held by one judge at least, to be entirely unhanpered by the Constitution while the remainder of the majority hold that it is bound only by such provisions of that instrument as are applicable to the particular case in hand.

There is thus a separate citizenship for Porto Rico, for the Philippines, and for the Canal Zone. A citizen of one does not necessarily have a claim for citizenship in the other, and certainly not for citizenship in the United States.

We would submit it as our conviction therefore, that such a state of affairs cannot be justified by the precedents of legislative act and judicial decision previous to the year 1898; that the doctrine of the government and of the majority of the Supreme Court is dangerous to American institutions and American liberties; and that the true and safe doctrine is that upheld by the minority of the court, and which says that the Constitution is the source and life of all government, and that it is the controlling force wherever the sovereignty and jurisdiction of the United States extend.

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